LIBRARY
SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1954

No. 220

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WARREN, APPELLANT,

vs.

STANLEY W. BOWERS (SUCCESSOR TO JOHN W. PECK), TAX COMMISSIONER OF OHIO

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

FILED JULY 16, 1954
PROBABLE JURISDICTION NOTED OCTOBER 14, 1954

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 220

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WARREN, APPELLANT,

vs.

STANLEY W. BOWERS (SUCCESSOR TO JOHN W. PECK), TAX COMMISSIONER OF OHIO

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

INDEX

	Original	Print
Proceedings in the Supreme Court of the State of Ohio	1	1
Petition for appeal	1	1
Assignment of errors and prayer for reversal	4	3
Order allowing appeal	7	4
Praecipe, citation and statement required by rule 12 (omitted in printing)	9	
Notice of appeal (omitted in printing)	16	
Proceedings before the Board of Tax Appeals, Department of Taxation	17	6
Entry of Board of Tax Appeals	17	6
Entry of Board of Tax Appeals in Case No. 22464 (omitted in printing)	29	
Opinion, per curiam	45	18
Opinions in case of Society for Savings in City of Cleveland v. Peck, Tax Commr., No. 33523 (omitted in printing)	50	
Application for rehearing	86	21

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DEC. 14, 1954

—9083

	Original	Print
Appeal bond (omitted in printing)	99	
Docket and journal entries	100	29
Judgment	102	31
Order denying rehearing	103	31
Briefs on behalf of appellant and appellee (omitted in printing)	104	
Proceedings before the Department of Taxation	172	32
Application for certificate of abatement	172	32
Order denying application	175	34
Proceedings before the Board of Tax Appeals	176	35
Notice of appeal	176	35
Stipulation of facts	178	36
Transcript of proceedings	186	43
Testimony of William C. Burkhart	195	50
Extract from Appellant's Exhibit 4—Charter	204	54
Appellant's Exhibit 5—1947 Tax Bill for Personal Property of Financial Institutions	214	54
Clerk's certificate (omitted in printing)	215	
Statement of points to be relied upon	216	55
Order noting probable jurisdiction	219	56

[fol. 1] [File endorsement omitted]

IN THE SUPREME COURT OF OHIO

No. 33525

First Federal Savings and Loan Association of Warren, Appellee

v.

Stanley E. Bowers (Successor to John Peck), Tax Commissioner of Ohio, Appellant

Petition for Appeal—Filed June 23, 1954

Now comes First Federal Savings and Loan Association of Warren and, for its petition for appeal to the Supreme Court of the United States, respectfully shows that:

On the 31st Day of March, 1954, final judgment was rendered in the above entitled cause by the Supreme Court of the State of Ohio, the highest Court in such state, against this appellant (appellee therein) and in favor of John W. Peck, Tax Commissioner of Ohio, (appellant therein) denying appellant's application for rehearing after reversing a decision of the Board of Tax Appeals of the State of Ohio, insofar as such decision had reversed an order of the Tax Commissioner of Ohio and remanded the cause to the Tax Commissioner with instructions to issue to this appellant for the years 1947-1951 a certificate of abatement for the [fol. 2] overpayment of intangible personal property taxes assessed against and paid by this appellant as a financial institution upon the basis of the property representing the capital employed by it at the aggregate amount of its reserves and undivided profits for such years and each of them.

In this suit, there was drawn in question the validity of statutes of the State of Ohio providing for and relating to the taxation of intangible personal property of financial institutions, particularly General Code §§ 5324, 5328-1, 5406, 5407, 5408, 5409, 5410, 5411, 5411-1, 5411-2, 5412, 5412 1, 5638-1, 5673-1 and 5673-2.

By its decision and judgment the Supreme Court of Ohio denied the exemption from personal property taxation by

the State of Ohio of United States bonds and interest thereon and shares in the Federal Home Loan Bank (a federal government instrumentality) owned by appellant and held that appellant was not entitled to deduction of the amount thereof from the basis of such taxes, in violation of the laws of the United States, U. S. Code Title 31, Section 742 and Title 12, Section 1433; and thereby invaded the fiscal powers of the federal government contrary to Article I, Section 8, deprived appellant of property without due process of law, denied it the equal protection of the laws and unreasonably discriminated against appellant by double taxation of its deposits contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The laws of Ohio so construed and held valid and applicable to appellant are repugnant to the laws and Constitution of the United States.

[fol. 3] Appellant presents herewith an Assignment of Errors and a Statement in Support of Jurisdiction on Appeal.

Wherefore, appellant prays the allowance of an appeal from the judgment of the Supreme Court of the State of Ohio to the Supreme Court of the United States; that the amount of security be fixed; that the material parts of the record, proceedings and papers upon which said final judgment and decree was based be duly authenticated and sent to the Supreme Court of the United States; that provision be made for the safe-keeping, transporting and return of the original transcript before the Tax Commissioner and the Board of Tax Appeals, the original exhibits introduced in evidence in the Board of Tax Appeals, the entry of the Board of Tax Appeals in the companion case of Society for Savings in the City of Cleveland, No. 22464 incorporated by reference in its entry in this case and all briefs.

Robert G. Day, Attorney for Appellant.

Hoppe, Day & Ford, 702 Second National Building, Warren, Ohio. Of Counsel.

[fol. 4] [File endorsement omitted]

IN THE SUPREME COURT OF OHIO

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed June 23, 1954

First Federal Savings and Loan Association of Warren, appellant herein, assigns the following errors in the record and proceedings in the Supreme Court of Ohio in the above entitled case.

1. The statutes of Ohio providing for and relating to the intangible personal property taxation of appellant as a financial institution upon its deposits, reserves and undivided profits as construed and enforced by the judgment of the Supreme Court of Ohio are repugnant to

(a) The Constitution of the United States Article 1, Section 8 and the Fourteenth Amendment, Section 1;

(b) The laws of the United States, to-wit: U. S. C. Title 31, Section 742 and Title 12, Section 1433.

[fol. 5] The laws of Ohio so construed in effect impose a tax upon, and deny exemption of, the United States bonds with interest thereon and Federal Home Loan Bank shares owned by appellant, invade the fiscal powers of the Federal government, deprive the appellant of property without due process of law, illegally discriminate against it and impose double taxation on the deposits of the appellant.

2. The Court erred in holding valid and not repugnant to the laws and the Constitution of the United States, the Statutes of Ohio providing for the taxation of appellant's property representing capital employed by it without deduction of the value of U. S. bonds and stock in the Federal Home Loan Bank (a federal government instrumentality) owned by appellant from the tax base.

3. The State of Ohio by the statutes involved herein and by the decisions, judgment and order of the Court

and Tax Commissioner invaded the fiscal powers of the federal government, deprived the appellant of property without due process of law, illegally discriminated against it and imposed double taxation on the deposits of the appellant, in violation of the laws and Constitution of the United States.

4. The Court erred in holding that the tax based [fol. 6] upon surplus or reserves and undivided profits is a tax upon the depositors whereas it was assessed against and paid by appellant without provision for reimbursement of appellant and is in legal effect a tax upon appellant.

5. The Court erred in reversing and not affirming the order of the Board of Tax Appeals insofar as the latter directed the issuance of a certificate of abatement of personal property taxes assessed against and paid by appellant for the years 1947-1951.

6. The judgment is contrary to law and to the evidence.

Wherefore, appellant prays that the final judgment of the Supreme Court of Ohio be reversed and for such other relief as may be fit and proper.

Robert G. Day, Attorney for Appellant

[fol. 7] [File endorsement omitted]

IN THE SUPREME COURT OF OHIO

[Title omitted]

ORDER ALLOWING APPEAL—Filed June 23, 1954

This day this cause came on to be heard upon the petition of First Federal Savings and Loan Association of Warren for appeal to the Supreme Court of the United States from the final judgment entered in the above entitled cause by the Supreme Court of the State of Ohio on March 31, 1954, and upon the assignments of error, prayer for reversal, and jurisdictional statement filed therewith; and upon consideration thereof it is ordered that an appeal

be and it is hereby allowed to the Supreme Court of the United States from the Supreme Court of Ohio as prayed for in said petition; that the Clerk of the Supreme Court of Ohio shall prepare and certify a transcript of the record and proceedings in the above entitled cause and transmit the same to the Supreme Court of the United States within forty (40) days from the date hereof.

[fols. 8-16] And, it appearing that the original papers including the transcript of the Tax Commissioner of Ohio and the exhibits may be necessary for inspection by the Supreme Court of the United States, it is ordered that the Clerk of this Court include in or transmit with the transcript of the record to the Supreme Court of the United States the original papers including *inter al.* the original transcript of proceedings and exhibits before the Tax Commissioner and the Board of Tax Appeals, of the Tax Department, for receipt and consideration along with the transcript and for return to the Clerk of this Court after determination of the appeal.

Further ordered that the amount of the appeal bond required of appellant be and it is hereby fixed in the sum of $250 with good and sufficient surety and that such bond be conditioned as required by law; and the appellant having presented herewith its bond for appeal in the sum of $250 conditioned as required by law the same is hereby approved and accepted.

Further ordered that citation shall issue in accordance with law.

Carl V. Weygandt, Chief Justice.

[fol. 17] BEFORE THE BOARD OF TAX APPEALS, DEPARTMENT OF TAXATION, STATE OF OHIO

No. 22533

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WARREN
Appellant,

vs.

JOHN W. PECK, Tax Commissioner of Ohio, Appellee
ENTRY—March 2, 1953

Appearances:

For the appellant, Robert G. Day, for the appellee, C. William O'Neill, Attorney General of Ohio by Joseph S. Gill, First Assistant.

For appellant *Amicus Curiae*, Charles A. Eberly.

This cause and matter came on to be considered by the Board of Tax Appeals upon an appeal filed herein under date of August 27, 1952, by the appellant above named from a final order of the Tax Commissioner dated July 30, 1952 in and by which final order the Tax Commissioner denied appellant's application for a certificate of abatement for the alleged overpayment of intangible taxes for the years 1947 through 1951.

The cause was submitted on the notice of appeal, the Tax Commissioner's Transcript for the years in question, a stipulation of facts signed by counsel, the evidence presented to this Board at a hearing upon the appeal, and briefs of counsel.

The notice of appeal, as filed with the Board of Tax Appeals, reads as follows:

> "Now comes the Appellant, First Federal Savings and Loan Association of Warren, whose principal office and place of business is at 175 East Market Street, Warren, Ohio and gives notice of appeal to the Board of Tax Appeals of Ohio from a finding and order of the Appellee John W. Peck, Tax Commissioner of Ohio, dated July 30, 1952, and mailed July 31, 1952, [fol. 18] denying Appellant's application and claim for

refund and/or abatement of taxes erroneously and illegally assessed against and paid by it as a financial institution for the years 1947-1951, respectively, and by implication for abatement of similar taxes erroneously and illegally assessed, overpaid and collected for the year 1952, such taxes for the year 1952 having been paid July 23, 1952.

Copy of the finding and order of the Appellee from which appeal is taken, marked Exhibit A, is hereto attached and made a part hereof.

The finding and order of the Appellee are erroneous in the following respects, to wit:

1. In denying and not allowing Appellant's application or claim for refund and/or abatement for the years and in the amounts following, to-wit:

1947	$4,372.44	1949	$3,982.98
1948	$3,976.77	1950	$4,004.19
	1951 $4,204.03		

2. In not allowing Appellant's application and claim for abatement for the year 1952 in the amount of $4,840.43.

3. In not finding overpayments of the taxes assessed against the Appellant for the years 1947-1952 and each of them and ordering the refund thereof or issue of a Certificate of Abatement therefor.

4. The value of United States Government Bonds, including principal and accrued interest thereon, and stock of the Federal Home Loan Bank, a federal government instrumentality, were erroneously and illegally included in the tax base or formula for assessment of the deposits (or capital), reserves and undivided profits of the Appellant and thereby in legal effect the State of Ohio imposed an illegal tax upon such securities exempted by the provisions of U. S. Code Title 31, Section 742 and Title 12, Section 1433.

[fol. 19] 5. The Statutes of Ohio as construed and enforced by the order of the Tax Commissioner and the order of the Tax Commissioner unjustly and illegally discriminate against the Appellant, deprive it of prop-

erty without due process of law and deny it the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States.

Wherefore Appellant prays that the finding and order of the Appellee be reversed, vacated, set aside, and held for naught; that the Appellant's claim for refund for the years 1947-1952 and each of them be allowed; that the Appellee be required to find the overpayments claimed and direct the refund and or abatement thereof as prayed for by Appellant; and for all such other relief to which Appellant may be entitled."

As will be noted in the final order of the Tax Commissioner complained of, that official made no order concerning the year 1952 and therefore, irrespective of the relief asked for the year 1952 in the notice of appeal, we only have jurisdiction to review the Tax Commissioner's order as issued—which is for the years 1947 through 1951; and lacking jurisdiction as to the year 1952 on the appeal now before us no consideration will be given as to the year 1952.

The final order of the Tax Commissioner complained of reads as follows:

"This day the application of First Federal Savings and Loan Association of Warren, Warren, Ohio, a financial institution for a Certificate of Abatement for the alleged overpayment of intangible taxes for the years 1947 through 1951 came on to be considered.

The taxpayer filed a timely application for a Certificate of Abatement for the years above mentioned contending that the taxes for said years were overpaid because the assessments included obligations of the United States. The tax commissioner finds that the application is based upon the decision of the Ohio Supreme Court in Wrenn Paper Company v. Glander, 156 O.S. 583, 158 O.S. 15, and Section 742, Title 31, United States Code.

[fol. 20] Upon consideration of all the available evidence the Tax Commissioner finds that the above decision applied to the Ohio franchise tax and is not dispositive of the issues raised by the applicant with respect to the intangibles tax.

Hence, the Tax Commissioner finds that there has been no overpayment for the years in question and it is therefore ordered that this application be and the same hereby is denied."

The agreed statement of facts filed with the Board of Tax Appeals under date of November 19, 1952, reads as follows:

"It is hereby stipulated and agreed by and between the parties hereto that the facts hereinafter stated are and shall be taken as true for all purposes in the above captioned case without further proof thereof, reserving to either party however the right to object to any part thereof upon the ground of relevancy or materiality and further reserving to each party the right and privilege to offer additional evidence on any matter.

1. First Federal Savings and Loan Association of Warren, Ohio (hereinafter called the "taxpayer") is and at all times hereinafter mentioned was a Federal Savings and Loan Association incorporated and existing under the laws of the United States, to-wit, the Home Owners' Loan Act of 1933 as amended (Title 12 U. S. C. Sec. 1464 et seq.) and having its principal place of business in Warren, Ohio and as such is and was an incorporated financial institution located in this state under the provisions of the tax laws of Ohio. It was originally incorporated in 1922 as "The Warren Savings and Loan Association" under the Building and Loan Laws of the State of Ohio and was converted to a Federal Savings and Loan Association in 1936.

2. The taxpayer has never had or issued any permanent or non-withdrawable shares or stock. All of the accounts of the shareholders or depositors in the taxpayer are and at all times involved herein, have been represented by savings share account pass books to which all deposits and dividends are credited and all withdrawals debited; all of such accounts were and are withdrawables shares of stock; i.e. the persons [fol. 21] owning, holding in trust or having the beneficial interest in such accounts have been and are entitled to withdraw any part or all the amounts cred-

ited to their savings share accounts and to make deposits therein.

3. The taxpayer is a member of the Federal Home Loan Bank of Cincinnati.

4. The following are true and correct extracts from the rules and regulations for the Federal Savings and Loan System promulgated by the Federal Home Loan Bank Board:

"§141.2 *Federal Association*—The term 'Federal association' means a Federal savings and loan association chartered by the Board as provided in section 5 of the Home Owners' Loan Act of 1933, as amended.

"§141.3 *Capital*—The term 'capital' means the aggregate of the payments on savings accounts in a Federal association, plus earnings credited thereto, less lawful deductions therefrom.

"§141.4 *Savings Account*—The term 'savings account' means the monetary interest of the holder thereof in the capital of a Federal association and consists of the withdrawal value of such interest.

"§141.6 *Withdrawal value*—The term 'withdrawal value' means the amount paid on a savings account in a Federal association, plus earnings credited thereto, less lawful deductions therefrom.

"§141.7 *General reserves*—The term 'general reserves' means the aggregate amount of reserves of a Federal association established by such association for the sole purpose of meeting losses. Any amount in a reserve for bad debts which is exclusively for bad debt losses, shall be deemed to be a part of the General Reserves and to be a part of the reserve for losses provided in the Charters of Federal associations which have a Charter E or a Charter K.

[fol. 22] "§ 141.8 *Surplus*—The term 'surplus' means the undistributed earnings of a Federal association which are held as unallocated reserves for general corporate use.

"§145.6-12 *Reserve for uncollected interest.* A 'Reserve for Uncollected interest' shall be main-

tained equivalent to all interest in default more than 90 days.

"§145.17 *Powers and duties*—When designated for that purpose by the Secretary of the Treasury a Federal association shall perform all such reasonable duties as fiscal agent of the Government specified by the Secretary of the Treasury. Such a Federal association shall exercise only such powers and privileges as a fiscal agent of the Government as are enumerated in regulations prescribed by the Secretary of the Treasury. When the designation for that purpose by any other instrumentality of the United States has been approved by the Board, a Federal association, upon qualification for such employment, shall perform the duties as agent of such instrumentality of the United States. Such a Federal association shall exercise only such powers and privileges as an agent of any other instrumentality of the United States as are prescribed by such other instrumentality of the United States."

The following are true and correct extracts from the rules regulations duly promulgated for the insurance of accounts under the National Housing Act as amended (Title 12 U. S. C. §1724 et seq.):

"§163.11 *Setting up, designation, and purpose of Federal Insurance reserve*—Each insured institution shall set up a Federal insurance reserve account which shall be used solely for the purpose of absorbing losses. No insured institution may pay dividends from its Federal insurance reserve account. Any insured state-chartered institution may by resolution of its board of directors or by other appropriate corporate action designate as its Federal insurance reserve account any reserve account which under the provisions of state law is established for the sole purpose of absorbing losses. Evidence of such action shall be filed with the Corporation. With the prior [fol. 23] written approval of the Corporation, any other reserve account which by specific and adequate corporate action of an insured institution is made

subject to charges for losses only, may be designated as its Federal insurance reserve account. The general reserves of Federal savings and loan associations operating under Charter K. or Charter N. are deemed to meet the requirements of this section. Any amount in a reserve for bad debts, which is exclusively for bad debt losses, shall be deemed to be a part of the Federal Insurance Reserve.

"§163.12 *Original credit to Federal Insurance reserve account*—During the fiscal year in which a certificate of insurance is issued to an insured institution, it shall credit to its Federal insurance account an amount at least equal to that fraction of three-tenths of one percent of all insurable accounts on the date of its latest financial statement or report in support of its application for insurance which the unexpired portion of its fiscal year from the date of such certificate is to its full fiscal year, calculated to the nearest month.

"§163.13 *Regular credits*—Each insured institution shall thereafter credit to its Federal insurance reserve, during each of its fiscal years, an amount equal to at least three-tenths of 1 percent of all insured accounts outstanding at the beginning of such fiscal year; and shall build up the Federal insurance reserve to an amount equal to at least 5 percent of all insured accounts within twenty years from such date: Provided, That credits to the Federal insurance reserve need not be made whenever such insurance reserve account equals or exceeds the minimum amounts required by this action. If for any reason, the Federal insurance reserve account of any institution which has been insured for at least twenty years is thereafter reduced to less than 5 percent of all insured accounts, such institution shall transfer to its Federal insurance reserve account, for each dividend period, at least 25 percent of its net operating income before the declaration of dividends or the payment of interest on savings, until its Federal insurance reserve account is again equal to at least 5 percent [fol. 24] of all insured accounts.

"§163.14 *Charging of losses and payment of dividends*—No insured institution which has charged losses to its Federal insurance reserve account shall declare any dividends or pay any interest on savings unless the amount standing to the credit of such account, after deduction of all charges, is equal to at least the amounts required under §163.13: *Provided*, That, for any year dividends may be declared or interest on savings paid when losses are charged to such reserve, if the declaration of such dividends or the payment of such interest on savings is first approved by the Corporation: *And provided* further, that the Corporation hereby approves, for any such insured institution which has been insured for a period of twenty years or more and whose Federal insurance reserve account, prior to the charging of such losses, equalled at least 5 percent of all insured accounts, the declaration of dividends and the payment of interest on savings if such insured institution shall have first transferred not less than 25 percent of its net operating income for the same dividend period to its Federal insurance reserve account."

5. The dates set by the Board of Tax Appeals under the provisions of General Code Section 5411-1 as of which the taxable deposits in financial institutions should be listed and assessed for the years involved herein are as follows:

Tax Year	
1947	November 7, 1946
1948	November 12, 1947
1949	November 4, 1948
1950	November 22, 1949
1951	November 14, 1950

6. The tax returns filed by the taxpayer and included in the transcript for the years involved herein are true and correct statements as to the items taken from the taxpayer's books of account. However, the taxpayer does not concede but contests the matters in issue herein including the conclusions in such returns relating to

the amounts of taxable deposits, to the taxable value [fol. 25] of shares or capital employed by the taxpayer, and the amount of taxes thereon.

7. The Tax Commissioner has assessed for the years and on or about the dates hereinafter set forth the taxpayer has paid the amount of financial institution taxes, set forth below, to wit:

Tax Year	Date of Payment	Amount
1947	July 7, 1947	$11,488.37
1948	July 7, 1948	13,562.70
1949	July 6, 1949	15,842.98
1950	July 6, 1950	17,182.64
1951	July 10, 1951	19,376.70

8. Upon the dates hereinafter set forth, the amount of bonds of the United States with accrued interest thereon held by the taxpayer and included in its balance sheet and the amount of Federal Home Loan Bank Stock held by the taxpayer and included in its balance sheet were as follows:

Date	U. S. Bonds & Interest	Federal Home Loan Bank Stock
November 7, 1946	$2,127,818.70	$58,400.00
December 31, 1946	1,929,485.42	58,400.00
November 12, 1947	1,929,157.08	58,400.00
December 31, 1947	1,929,985.92	58,400.00
November 4, 1948	1,929,654.86	60,000.00
December 31, 1948	1,931,489.64	60,000.00
November 22, 1949	1,929,757.54	70,000.00
December 31, 1949	1,932,096.72	70,000.00
November 14, 1950	2,030,263.38	70,000.00
December 31, 1950	2,032,013.07	70,000.00

9. All of the returns referred to herein, the claims for refund and abatement, and notice of appeal were duly and regularly filed and the taxes were paid within the times required by law.

10. Upon the conversion of the Warren Savings and Loan Association into a Federal Savings and Loan Association in 1936, the total number of depositors or shareholders was 1677.

[fol. 26] The number of savings share accounts of the taxpayer at the beginning, the number of new accounts opened and the number of accounts closed, in each of the years involved herein were and are as follows:

Year	Number at Beginning	New Accounts	Accounts Closed
1947	4958	1772	1038
1948	5692	2094	1159
1949	6627	1732	1287
1950	7072	3487	2756
1951	8479	3475	2799

The pertinent portion of General Code Section 1464-3 (2), by virtue of which the appellant filed its application for a certificate of abatement with the Tax Commissioner, reads as follows:

> "* * *. On written application of any person, firm or corporation claiming to have overpaid to the treasurer of state, at any time within five years prior to the making of such application but not prior to January 1, 1938, any tax payable under any law which the department of taxation is required to administer, or on his own motion, to investigate the facts and to make, in triplicate, a written statement of his findings; and, if he shall find that there has been an overpayment, issue, in triplicate, a certificate of abatement, payable to the taxpayer or his or its assigns or legal representative and showing the amount of the overpayment and the kind of tax overpaid. * * *."

The question presented to us for solution can therefore be stated as follows:

Was the Tax Commissioner in error----

(1) In not finding that the appellant had overpaid its intangible taxes for the years 1947 through 1951, and

(2) In not issuing certificates of abatement to appellant in the proper amount?

or to state the question in another way:

> [fol. 27] Was the Tax Commissioner in error in including in the tax base the value of federal securities owned by appellant in assessing, pursuant to Section 5412, General Code, the value of "property representing the capital employed by appellant (financial institution), the capital of which financial institution is not divided into shares?

Upon a consideration of this case as thus presented we find that this appellant is in the same category as the Society for Savings in the City of Cleveland insofar as its capital is not divided into shares and insofar as it thus has no permanent shareholders. And, falling within the same classification, this appellant must be afforded the same relief as given to the Society for Savings in the City of Cleveland (Case No: 22464—decided by the Board of Tax Appeals under the same date as this entry, the contents and reasoning of which are to be considered as a part of this entry insofar as the same are applicable to the facts).

Our investigation discloses that the appellant has listed in its return and has paid the tax on deposits as assessed by the Tax Commissioner for the years in question, as follows:

Year	Deposits	Tax
1947	$5,368,540	$10,737.08
1948	6,327,680	12,655.36
1949	7,364,640	14,729.28
1950	7,920,990	15,841.98
1951	8,893,480	17,786.96

As to these deposits and the tax paid thereon we find that there was no error. The tax is upon the deposits and not upon any federal securities; and the tax is not a tax against appellant as an entity but is a tax which is assessed against the deposits themselves and is a tax which is authorized by law to be passed on to individual depositors; and "deposits", as defined by Section 5324, Ohio General Code, includes withdrawable stock—which stock by its very nature is not a permanent part of appellant's capital.

Our investigation discloses that appellant has listed in

its returns and has paid the tax on "capital" as assessed by the Tax Commissioner for the years in question, as follows:

[fol. 28]

Year	Surplus reserves and undivided profits	Tax
1947	$375,640	$ 751.28
1948	453,670	907.34
1949	556,850	1,113.70
1950	670,330	1,340.66
1951	794,870	1,589.74
	Total	$5,702.72

We also find that the appellant, for each of the years in question, has listed in its return under a heading devoted "Resources" items of "Obligations of U. S. and Federal Instrumentalities" in an amount of approximately $2,000,000. Obviously if the amount of federal securities in each year is deducted from the total of "Surplus, reserves and undivided profits" for each year, the computation will result in a negative figure upon which no tax would be due. And having paid the tax thereon and having, within time, applied for a certificate of abatement with reference thereto, the appellant is entitled to have the same issued to him.

It is therefore considered and ordered that the final order of the Tax Commissioner herein complained of be reversed and that this cause be remanded to that official with instructions to issue to appellant, for the years 1947 through 1951, a certificate of abatement for the overpayment of intangible taxes in the amount of $5,702.72.

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the Department of Taxation this day taken with respect to the above matter.

(S.) Francis P. Howard, Secretary

(Seal)

[fols. 28a-44] *Entry of Board of Tax Appeals* in companion case of Society for Savings in the City of Cleveland v. John W. Peck, Tax Commissioner of Ohio, B.T.A. No. 22464, appearing in certified transcript at this point is omitted since it is printed in the record in No. 204, O. T. 1954.

[fol. 45] IN THE SUPREME COURT OF OHIO

Case No. 33525

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WARREN, Appellee,

v.

JOHN W. PECK, Tax Commissioner of Ohio, Appellant

OPINION

Appeal from the Board of Tax Appeals

The First Federal Savings and Loan Association of Warren, herein referred to as applicant, is incorporated under federal statutes and has only withdrawable shares.

It filed with the Tax Commissioner an application pursuant to subdivision 2 of Section 1464-3, General Code, for a certificate of abatement for alleged overpayment of taxes assessed pursuant to Sections 5406 to 5414, General Code, and levied pursuant to Section 5638-1, General Code, (1) on "the amount of its deposits" (its withdrawable shares being defined by Section 5324, General Code, as deposits) and (2) on "the capital employed, or the property representing it, in" that institution.

It appeared that, if the amount of federal securities and the value of federal home loan bank stock owned by the applicant were deducted from the amount of its total assets, the remaining amount would be less than the amount of its withdrawable shares or deposits. The applicant claimed that the Tax Commissioner should not have taxed with-[fol. 46] drawable shares of the institution as deposits at more than that remaining amount and should not have assessed any tax on "the capital employed, or the property representing it, in" the institution.

This application was denied by the Tax Commissioner. On appeal to the Board of Tax Appeals, the order of the Tax Commissioner was affirmed only so far as it related to taxes on the shares as deposits, and the Tax Commissioner was directed to issue the certificate of abatement requested so far as it related to taxes assessed on "the capital employed, or the property representing it, in" the institution.

In case No. 33524, the applicant has appealed to this court from that part of the decision of the Board of Tax Appeals which affirmed the order of the Tax Commissioner. In case No. 33525, the Tax Commissioner has appealed to this court from that portion of the decision of the Board of Tax Appeals which reversed the order of the Tax Commissioner.

OPINION

PER CURIAM.

For the reasons which we gave in support of our judgment in *Society for Savings in City of Cleveland* v. *Peck, Tax Commr., ante*, 122, we are of the opinion that the taxes involved in the instant cases, so far as they relate to "the surplus or reserve fund and the undivided profits" of the [fol. 47] corporation, are taxes on the intangible property interests of the owners of the corporation representing their capital employed in the corporation, and those taxes are not taxes on the corporation or on the capital or the assets of the corporation. See also last sentence of Section 5412, General Code, and discussion thereof in *Society for Savings* v. *Peck, Tax Commr., supra.*

So far as the taxes involved in the instant cases relate to taxes on the withdrawable shares of the corporation as deposits, such taxes are clearly taxes levied against the owners of the deposits. See Sections 5406, 5324, 5412, 5412-1, 5638-1, 5673-1 and 5673-2, General Code.

In addition, the First Federal Savings & Loan Association of Warren has argued that its shares are exempt from taxation by reason of the provisions of Section 5323, General Code, reading:

"The term 'investments' as used in this Title, includes the following:

"Shares of stock in corporations, associations and joint stock companies, under whatever laws organized or existing, excepting (1) those in such corporations and associations as constitute instrumentalities of the federal government for the taxation of which by the several states no provision is made by the act of the Congress of the United States, (2) those in financial institutions, dealers in intan- [fol. 48] gibles and domestic insurance companies as defined by Chapter four of this Title, and (3) such as are defined in this Chapter as 'deposits.' "

It is contended by the corporation that it comes within the first numbered exception. But see 12 U.S. Code, Section 1464h. However, it definitely is described by the words in the second numbered exception which read, "financial institutions * * * as defined by Chapter Four of this Title (including Sections 5406 to 5414, General Code)." Likewise, Section 5324, which is in the Chapter in which Section 5323 appears, defines withdrawable shares, such as those of this corporation, as "deposits." Section 5406 does refer to Section 5324, General Code. Otherwise there is nothing in the assessment sections here involved (Sections 5406 to 5414, inclusive, General Code) which do refer to the Chapter in which Section 5323 is found. As held in *Broadview Savings & Loan Co.* v. *Peck, Tax Commr., ante*, 119, the provisions of Section 5323, General Code, are not to be read *in paria materia* with Sections 5406 to 5414, inclusive, General Code. Nothing in those sections justifies any reference to the exception relied upon by applicant in Section 5323, General Code.

Finally, it is argued that, since such a tax cannot be imposed on the owners of an unincorporated financial institution without deducting federal securities in the computation of the tax, such a deduction must also be made in computing [fol. 49] the tax where, as here, an incorporated financial institution carrying on the same line of business is involved. We believe that the decision and the reasoning of the Supreme Court of the United States in *Des Moines National Bank* v. *Fairweather, Mayor*, 263 U.S., 103, 68 L. Ed., 191, 44 S. Ct., 23, is a complete answer to any such argument.

The decision of the Board of Tax Appeals so far as it

relates to case No. 33524 is affirmed and so far as it relates to case No. 33525 is reversed.

Judgment accordingly.

Weygandt, C. J., Middleton, Taft, Hart, Zimmerman and Lamneck, JJ., concur.

Stewart, J., concurs so far as the decision of the Board of Tax Appeals is affirmed and dissents so far as such decision is reversed.

[fols. 49a-85] *Opinions* in companion case of Society for Savings in the City of Cleveland v. John W. Peck, Tax Commissioner of Ohio, No. 33523, appearing in certified transcript at this point are omitted since they are printed in the record in No. 204, O.T. 1954.

[fol. 86] IN THE SUPREME COURT OF OHIO

No. 33525

APPLICATION FOR REHEARING—Filed March 24, 1954

Now comes First Federal Savings and Loan Association of Warren, (hereinafter called the "Tax*a*pyer") Appellant in Cause No. 33524 and Appellee in Cause No. 33525 aforesaid and makes application to the court for a rehearing in each of such causes, for reversal of the order of the Board of Tax Appeals in Cause No. 33524 and for affirmance of the order of the Board of Tax Appeals in Cause No. 33525 upon the grounds and for the reasons hereinafter set forth.

(References herein will be to the pages of the official opinions in these cases, 161 O. S. 149 et seq., and in the companion opinion in *Society v. Peck*, 161 O. S. 122 et seq.)

The majority opinion failed to pass expressly upon the principal questions presented in these cases, to-wit, whether the statutes of Ohio construed to deny the deduction of Federal securities from the tax base for the assessment of the taxes involved herein would violate the provisions of [fol. 87] the Federal statutes exempting from taxation the

value of such securities and whether the statutes so construed are repugnant to the Constitution of the United States. These questions are presented on Page 3 of the brief of First Federal and on Page 2 of its Reply and Answer Brief. We believe that the majority opinion necessarily implies that the statutes construed by the court are not violative of the Federal Statutes and are not repugnant to the Constitution of the United States; nevertheless, we ask that the court specifically pass upon those points in order that there be no question of jurisdiction upon appeal to the Supreme Court of the United States.

The opinion presents an additional basis of unconstitutionality. As construed by the Court, the statutes would impose upon the deposits in each institution two separate taxes, i. e. a tax of two mills on the dollar of the amounts of the deposits and another tax of two mills on the dollar on the amount of the capital employed by the financial institution, that is, upon its surplus, reserves and undivided profits. This is double-taxation—two personal property taxes assessed against the same property—and results in depriving the Taxpayer of property without due process of law and denying it the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States. The Supreme Court of the United States in *Senior v. Braden*, 295 U. S. 422, 55 S. Ct. 800 reversing the [fol. 88] decision of this court in 128 O. S. 597 held that the Ohio intangible tax upon investments in land trust certificates representing interests in land which were also subject to real estate taxes was double taxation contrary to the Fourteenth Amendment. The depositors in Society for Savings and in the Taxpayer here are no different from the depositors in banks or savings and loan associations having permanent shares or capital stock yet their deposits, under the decisions announced, would be taxed doubly whereas the depositors in institutions having permanent shares or capital stock would be taxed only upon the withdrawal value of their deposits and this despite the fact that in each case the depositors have the protection of the reserves and undivided profits behind them guarding against any loss. This cannot be justified on the ground that there are two different kinds of property—the deposits on the one hand and the reserves and undivided profits on the other; for their rights are in-

separable. So long as the depositor maintains his deposit, he has the protection of the surplus, reserves and undivided profits; but he cannot withdraw his deposit without losing that protection; hence, if there were any ownership interest coupled with the deposit, the two would constitute only one item of property and not two separate items. No value is added by surplus, reserves and undivided profits and the additional tax on deposits would be confiscatory.

The taxes involved were in fact and in law levied and [fol. 89] assessed against the property of the Taxpayer as a financial institution, and were so designated in the tax bills therefor (Appellant's Exhibits 5, 6, 7, 8 and 9) which read "Tax Bill For Personal Property of Financial Institutions" and were not assessed or levied upon intangible property interests of Taxpayer's depositors.

In the case of the tax upon the surplus or reserves and undivided profits just as in the case of *Home Savings Bank v. Des Moines*, 205 U. S. 503, 519 the statute requires the corporation not merely primarily, but finally, to pay the tax. There is no provision of law for recovery of such tax from the depositors even if it be construed as a tax upon them.

The majority opinions erroneously construe the words "capital" and "the property representing it" in the statutes involved as meaning a part of the interest or claim of the depositor in or against the corporation rather than as describing the property and assets subject to its liabilities. We submit that semantics of the majority opinions lead to one conclusion and then jump to the other. The proper distinction is between the capital stock or shares of or in the institution on the one hand and the capital of, employed by, or in, the institution on the other. That distinction is clearly observed in this court's quotation (pp. 127-128) from *National Bank* v. *Commonwealth*, 76 U. S. (9 Wall.) 353 and the other opinions from which the court quotes. [fol. 90] The same distinction is found in G. C. §5408 which provides for the assessment of *shares of stockholders* in a financial institution the capital stock of which is divided into shares, in two different clauses depending on whether the institution is incorporated or unincorporated, and in another clause the *capital employed* or *the property representing it* in an institution the capital stock of which is not divided into shares or which has no capital stock. The

terminology used with respect to the taxation of interests of the shareholders is "shares" or "capital stock", whereas the terminology used generally with reference to the interests and property of the institution is "capital" or "the property representing it." So in G. C. #5412 provision is made for the assessment of the taxable shares of the institution in one case and the value of the property representing the capital employed by the institution in the other case, i. e., in case of an institution whose capital is not divided into shares; and in the case of an incorporated financial institution all of whose shares are deposits as defined in G. C. #5324, the assessment of shares shall exclude the capital stock thereof (i. e., the interest of the depositors) but shall include the surplus or reserve and undivided profits. This last sentence of G. C. #5412 does not refer to the case of "shareholders" in an incorporated financial institution of that sort but to the case of the "institution" [fol. 91] itself. The deposits and the capital measured by surplus, reserves and undivided profits (excluding the capital stock or interest of the depositors) are separately taxed as of different dates to the institution.

G. C. #5638-1 imposes one tax on deposits, another tax on shares in and capital employed by financial institutions.

This court's quotation (p. 129) from *Van Allen v. Assessors*, 70 U. S. (3 Wall.) 573, 583, does not support the definition of capital adopted by this court in the cases at bar. The quotation begins,

> "* * * the tax on the *shares* is not a tax on the *capital* of the bank"

and proceeds in the next paragraph,

> "The interest of the shareholder entitles him to participate in the net profits of the bank in the employment of its *capital* during the existence of its charter, in proportion to the number of his shares." (emphasis ours)

We do not believe that "on a hasty reading" or, *a fortiori*, on a careful reading the words "capital employed or property representing it" found in G. C. #5408 or the words "value of the property representing the capital em-

ployed by such financial institution not divided into shares" found in G. C. #5412 may reasonably be argued as describing the interest or claim of depositors in or against the institution. Those words are contrasted with the words "shares" and "capital stock" and, we submit, were used in the statutes with a fair degree of accuracy to express the [fol. 92] intention of the legislators. The statutes indicate a rather comprehensive intention to tax on a comparable basis various property interests in and of financial institutions under a number of varying circumstances. In the case of incorporated institutions having permanent capital stock or shares, a tax is imposed upon those shares, the property interest of the shareholders or stockholders. In the case of an unincorporated association having capital stock divided into shares, the tax is imposed likewise upon the shares but in such instance there is no corporate entity intervening, and the property of the institution is the property of the shareholders therein, regardless of whether it is defined as being held in shares or in fractional interests. The third situation is that of an institution having no shares, the mutuals like Society for Savings in the City of Cleveland and First Federal which has no true shares but whose shares are deposits. Incidentally, although it is not in the record, the Federal Home Loan Bank Board has recently prescribed and the Taxpayer has this year adopted a new form of charter in which the term "shares" no longer appears but instead the words "savings accounts" are used. Obviously, in the case of institutions without permanent capital but having only deposits (or so-called withdrawable share accounts which are defined in the law—G. C. #5324—as deposits) the assessment against them must be limited to the amounts which are withdrawable. These amounts [fol. 93] vary from day to day as the depositors make additional deposits or withdrawals from their accounts and as shown in the record, numerically, there is a complete change in the accounts by closing of old accounts and opening of new accounts every three years or about one-third of all accounts each year. The reserves are required by law and while liquidation is possible, there is no occasion for liquidation and distribution thereof short of losses or business reverses sufficient to wipe out the reserves so as in the opinion of the examining officer no longer to justify the

hazard to the public and the Federal Savings and Loan Insurance Corporation of continuing longer in business; but in the meantime, such inchoate interest as any depositor may have is lost upon the withdrawal of his deposit and may be watered down to substantially nothing by increased deposits of others. Society for Savings has been in business for over 100 years and Taxpayer for 32 with no hope in any depositor of realizing on any inchoate right in its reserves.

We submit that the terms "capital", "the capital employed by" or "the capital employed in" a financial institution or "the property representing it" are used in the case of institutions not having permanent capital stock to describe property owned by the institution, not property interests claims of individuals in or against the institution. The argument that the construction contended for by the taxpayers in these cases imputes to the General Assembly [fol. 94] the excessive or wasteful use of words, defeats itself. Perhaps it is too much to attribute to the legislature perfection and the most economical use of words and an intent not to use any words which do not describe or apply to something already described or covered. If the minimum use of words were a requisite, G. C. #5408 might well be still further condensed to read

> "All the shares of stockholders in an incorporated financial institution located in this state having capital stock divided into shares, excepting such as are defined in #5324 of the General Code as deposits, and the property representing capital in financial institutions not incorporated or which have no capital stock other than deposits shall be listed and assessed at the book value thereof and taxed in the manner provided in this chapter"

saving more than nine words. This is only by way of example. If the interpretation declared by the Court of the aim and meaning of the Legislature were correct, G. C. ##5408, 5412, 5638 and 5638-1 might well be consolidated into a single section levying and assessing a tax of five mills on the dollar against the interests and claims of shareholders, partners, proprietors and depositors in and against the

financial institution. Nor should this Court yield to the Legislature in economy of expression.

The word "capital" whether used in conjunction with the words "in", "of", "employed by" or "employed in" refers, we submit, to the property which the corporation employs or uses in the transaction of its business. It includes in the case of a financial institution, the real prop [fol. 95] erty on which it transacts its business, the cash on hand and on deposit with other institutions, notes, mortgages, bonds and other property and assets used in carrying on its business subject, of course, to its debts. The capital or property of the institution is generally distinguished from the interests of its shareholders and creditors by the use in describing the latter of the terms "capital stock" or "shares."

We submit that it is reasonable to impute to the General Assembly an intent to provide for taxing the property of the institution in cases where that is necessary by reason of the nature of the institution to equalize the taxation of shares in institutions having permanent stock. It is only in the cases of the shares in incorporated institutions and deposits that a tax can possibly be assessed or any one other than the institution itself. In case of an unincorporated institution whether or not divided into shares the opinion is in error; no corporate entity intervenes and the property of the proprietor, proprietors or partners is the property of the institution itself whether it be described as shares, capital, capital employed, or property representing it, or aliquot interests therein. In an incorporated institution not having permanent shares or in an unincorporated institution, the taxable equivalent of permanent shares is the capital employed by it—the property of the institution.
[fol. 96] Unlike the statute of Iowa described in the quotation (p. 133) from *Des Moines National Bank* v. *Fairweather*, 263 U. S. 103, our statutes do not provide that except for real estate "the property of such corporation shall not be otherwise assessed." G. C. #5409 provides:

> "The real estate of a financial institution shall be taxed in the place where it is located, in like manner as the real estate of persons is taxed; but the tax provided for in this chapter shall be in lieu of all other

taxes on the other property and assets of such institution."

The taxes provided in this chapter are in lieu of all other taxes on other property, i. e., personal property; but in cases where there are no permanent shares to tax and discrimination would result from the differences in organization, this chapter imposes a tax upon the property of the corporation, contrary to the statute involved in the *Fairweather* case.

We submit that in the case of First Federal Savings and Loan Association of Warren the Legislature did not intend G. C. #5412 as imposing two assessments against deposits but as assessing one tax on deposits whether they be construed as a tax on depositors or on the institution and another tax on the surplus or reserves and undivided profits to be assessed against and paid by the institution itself.

The majority opinion (p. 137) attempts to meet the fact of any provision for passing on to the depositors the tax based on surplus, reserves and undivided profits by saying [fol. 97] that the inability to pass the tax on results in substance in passing the tax on by reducing the amount of profits available for dividends or interest to the extent of the taxes paid. This also goes to illustrate the fallacy of counting the number of words used to determine the intent of the legislature since, if this were true, the provisions of G. C. ##5672, 5673, 5673-1 and 5673-2 were unnecessary. The tax would have been valid and constitutional upon the theory of the majority opinions even though there were no provision whereby the bank could reimburse itself for the tax paid upon the deposits or shares owned by its depositors or shareholders. In this very situation, however, the Supreme Court of the United States held a similar law of Iowa unconstitutional because it contained no provision for reimbursement of the bank for taxes paid if they be construed to be paid in behalf of the depositors and shareholders. *Home Savings Bank v. Des Moines*, 205 U. S. 503.

We realize that the court is eager to protect the revenues of the state and likewise that a substantial amount of tax is involved in allowing the deduction of Federal Securities from tax base of personal property taxes and that where

such deduction is allowed in the case of unincorporated institutions and in the case at least of surplus, reserves and [fols. 98-99] undivided profits or property representing them in mutual institutions having no permanent capital stock, similar right of deduction is claimed by institutions having permanent capital stock or shares in order to avoid discrimination; but the fiscal power of the Federal Government is likewise entitled to protection. The Constitution and the statutes of the United States compel the allowance of deduction for stock and obligations issued by the government and its instrumentalities.

If the revenues of the state be seriously affected, the remedy is for the Legislature, not the Court, to declare.

Respectfully submitted, (S.) Robert C. Day, Attorney for First Federal Savings and Loan Association of Warren.

[File endorsement omitted.]

[fol. 100] In the Supreme Court of Ohio

No. 33525

[Title omitted]

Memoranda of Pleadings, Etc., Filed, Writs Issued, Etc., Judgments, Orders and Decrees

Date

April 1, 1953. Notice of Appeal filed. 4-6-53 proof of service filed.

April 18, 1953. Transcript of Record & Abstract of Docket (same as 33524) filed.

April 18, 1953. Cause docketed.

May 19, 1953. Papers taken by Rodenfels. 6-23-53, returned.

May 26, 1953. Entry extending time for filing appellant's brief to November 1, 1953, appellees' brief to December 1, 1953. Carl V. Weygandt, C. J. J. 40 page 613.

June 26, 1953. Printed brief of First Federal Savings & Loan Association filed and proof of service filed.

Date

June 26, 1953. Printed record filed.

August 25, 1953 Printers receipted bill filed.

[fol. 101] November 2, 1953. Brief of Tax Commissioner filed. 11 4 53 proof of service filed.

January 14, 1954. Leave to file Appellee's Answer brief instanter filed.

January 14, 1954. Appellee's non printed brief filed. 1 15 54 proof of service filed.

March 10, 1954. Decision Reversed. J. 41, page 149.

March 16, 1954. Notified application for rehearing to be filed.

March 24, 1954. Application for rehearing filed. 3 26 54 proof of service filed.

March 31, 1954. Rehearing denied. J. 41, page 176.

May 27, 1954. Entry substituting Stanley J. Bowers for John W. Peck, as Tax Commissioner approved. Carl V. Weygandt. C. J. J. 41, page 217.

June 23, 1954. Petition for appeal filed.

June 23, 1954. Order allowing appeal filed.

June 23, 1954. Assignments of Error and prayer for reversal filed.

June 23, 1954. Statement in support of jurisdiction filed.

June 23, 1954. Statement required by paragraph 2, Rule 12 of the Rules of the U. S. Supreme Court filed.

June 23, 1954. Bond in sum of $250.00 Aetna Casualty & Surety Company, as surety, approved and filed.

June 23, 1954. Citation issued, returned & filed.

June 23, 1954. Precipe for transcript of Record filed.

July 7, 1954. Statement in Opposition to Appellant's Statement of Jurisdiction and Motion to Dismiss or Affirm filed.

[fol. 102] May 26, 1953. Entry: With approval of the parties it is hereby ordered:

1. That the exhibits received in evidence or made a part of the record by way of proffer in each of the above cases need not be printed.

2. The time for filing the printed portion of the record in each of the above cases is extended to and including July 15, 1953.

3. The dates for filing of briefs in each of the above cases shall be as follows:

Appellant's opening brief in Case No. 33524, September 15, 1953;

The brief of the Tax Commissioner in each case, November 1, 1953;

Appellant's reply brief in Case No. 33524, November 20, 1953;

Appellees' briefs in cases No. 33523 and No. 33525, December 1, 1953.

Wednesday, March 10, 1954.

JUDGMENT

This cause came on to be heard upon the transcript of the Record of the Board of Tax Appeals and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the decision of the said Board of Tax Appeals be and the same hereby is reversed for the reasons stated in the opinion rendered herein, and said cause is remanded to the Board of Tax Appeals for further proceedings in accordance with the opinion rendered herein.

It is further ordered that appellant recover from appellee his costs herein expended taxed at $—— for which execution is awarded.

Ordered, That a special mandate be sent to the Board of Tax Appeals, to carry this Judgment into Execution.

[fols. 103-171] ORDER DENYING REHEARING—March 31, 1954

Upon consideration of the above application for rehearing, it is ordered by the Court that rehearing be, and the same hereby is, denied.

Thursday, May 27, 1954. Entry: It appearing that pending the appeals in the above captioned cases Stanley J. Bowers has succeeded John W. Peck in the office of the Tax Commission of Ohio it is

Ordered that Stanley J. Bowers, Tax Commissioner be and he is hereby substituted as appellee in Cause No. 33524 and as appellant in Cause No. 33525.

[fol. 172] BEFORE THE DEPARTMENT OF TAXATION OF OHIO

In the Matter of the Application of First Federal Savings and Loan Association of Warren, Warren, Ohio, a Financial Institution, for a Certificate of Abatement for the Alleged Overpayment of Intangible Taxes for the Years 1947 Through 1951.

APPLICATION FOR CERTIFICATE OF ABATEMENT—Filed July 3, 1952

The Tax Commissioner
Tax Department of Ohio
State Office Building
Columbus, Ohio

Dear Sir:

Re: First Federal Savings and Loan Ass'n of Warren, 175 E. Market Street, Warren, Ohio. Claim for Refund and Abatement of Taxes on Financial Institutions.

First Federal Savings and Loan Association of Warren (hereinafter called the "taxpayer") hereby makes claim for refund and/or abatement of taxes and assessments, illegally and erroneously assessed for each of the years 1947 to 1952, both inclusive, overpaid and collected by the state of Ohio for each of the years 1947 to 1951, both inclusive, together with interest thereon, from the time of payment.

The taxpayer is a federal savings and loan association organized and existing under the laws of the United States [fol. 173] and under such laws was and is required to hold stock in the Federal Home Loan Bank, a federal government instrumentality, in the amounts hereinafter listed. The period involved are the calendar years 1947 to 1952, both inclusive.

The character of the tax involved is the tax assessed against the taxpayer as a financial institution upon the basis of its deposits, capital, surplus or reserves, and undivided profits.

The time within which this claim may be legally filed has not expired.

The years involved, the total amount of deposits, capital,

reserves and undivided profits returned and used as the tax base upon which the assessment was made, the total tax assessed, the amounts illegally and erroneously included in the tax base representing the principal and interest upon bonds of the United States and stock of the Federal Home Loan Bank (a federal instrumentality) both of which are exempt from tax and the amount overpaid and of which refund is claimed for each year are as follows:

(1)	(2)	(3) Amount Illegally & Erroneously Inc.		(4)	(5)	(6)	(7)
Year	Total Amount Returned	*U. S. Bonds and Interest	F.H.L.B. Stock		Total Tax Assessed or Paid	Date Paid	Refund Claimed
1947.....	$ 5,744,182.68	$2,127,818.70	$ 58,400.00		$11,488.37	7- 7-47	$4,372.44
1948.....	$ 6,781,350.00	$1,929,985.89	$ 58,400.00		$13,562.70	7- 4-48	$3,976.77
1949	$ 7,921,490.00	$1,931,489.64	$ 60,000.00		$15,842.98	7- 6-49	$3,982.98
1950	$ 8,591,320.00	$1,932,096.72	$ 70,000.00		$17,182.64	7- 6-50	$4,004.19
1951	$ 9,688,350.00	$2,032,013.07	$ 70,000.00		$19,376.70	7-10-51	$4,204.03
1952	$10,656,760.00	$2,286,216.83	$134,000.00		$21,313.52	—	$4,840.43

(* The amounts shown in column (3) are as of December 31 of the preceding year in each case except for the year [fol. 174] 1947, which is shown as of the date prescribed for assessment of deposits, to wit: November 7, 1946. The amount of bonds and accrued interest on December 31, 1946 was $1,929,485.42.)

The obligations of the United States including the principal and accrued interest on bonds issued upon it and stock of the Federal Home Loan Bank were erroneously and illegally included in the tax base—Wren Paper Company v. Glander (and five other cases) O. S. 583 and authorities cited therein; Title 31 U. S. C. Section 742; Title 12 U. S. C. Section 1433; and Rosch v. First Savings & Loan Association, 203 S. W. 2d 1006.

Wherefore, the taxpayer claims that the taxes upon its deposits, capital, reserves and undivided profits have been overpaid as aforesaid and asks that the Tax Commissioner investigate the facts, find such overpayment, and direct the refund and/or abatement of such taxes to the extent of such overpayment with interest thereon from the several dates

of payment, and for all other relief to which it may be entitled.

Respectfully,

First Federal Savings and Loan Association of Warren by Robert G. Day, Attorney.

[Duly verified.]

[fol. 175] BEFORE THE DEPARTMENT OF TAXATION

ORDER DENYING APPLICATION—Dated July 30, 1952

This day the application of First Federal Savings and Loan Association of Warren, Warren, Ohio, a financial institution, for a certificate of abatement for the alleged overpayment of intangible taxes for the years 1947 through 1951 came on to be considered.

The taxpayer filed a timely application for a certificate of abatement for the years above mentioned contending that the taxes for said years were overpaid because the assessments included obligations of the United States. The Tax Commissioner finds that the application is based upon the decision of the Ohio Supreme Court in Warren Paper Company v. Glander, 156 O. S. 583, 158 O. S. 15, and Section 742, Title 31, United States Code.

Upon consideration of all the available evidence the Tax Commissioner finds that the above decision applied to the Ohio franchise tax and is not dispositive of the issues raised by the applicant with respect to the intangibles tax.

Hence, the Tax Commissioner finds that there has been no overpayment for the years in question and it is therefore ordered that this application be and the same hereby is denied.

Department of Taxation John W. Peck, Tax Commissioner.

[fol. 176] BEFORE THE BOARD OF TAX APPEALS

[Title omitted]

NOTICE OF APPEAL—Filed August 27, 1952

Now comes the appellant, First Federal Savings and Loan Association of Warren, whose principal office and place of business is at 175 East Market street, Warren, Ohio and gives notice of appeal to the Board of Tax Appeals of Ohio from a finding and order of the appellee, John W. Peck, Tax Commissioner of Ohio, dated July 30, 1952, and mailed July 31, 1952, denying appellant's application and claim for refund and/or abatement of taxes erroneously and illegally assessed against and paid by it as a financial institution for the years 1947-1951, respectively, and by implication for abatement of similar taxes erroneously and illegally assessed, overpaid and collected for the year 1952, such taxes for the year 1952 having been paid July 23, 1952.

Copy of the finding and order of the appellee from which appeal is taken, marked Exhibit A, is hereto attached and made a part hereof.

The finding and order of the appellee are erroneous in the following respects, to wit:

[fol. 177] 1. In denying and not allowing appellant's application or claim for refund and/or abatement for the years and in the amounts following, to wit:

1947	$4,372.44	1949	$3,982.98
1948	$3,976.77	1950	$4,904.19
	1951	$4,204.03	

2. In not allowing appellant's application and claim for abatement for the year 1952 in the amount of $4,840.43.

3. In not finding overpayments of the taxes assessed against the appellant for the years 1947-1952 and each of them and ordering the refund thereof or issue of a certificate of abatement therefor.

4. The value of United States Government Bonds, including principal and accrued interest thereon, and stock of the Federal Home Loan Bank, a federal government instrumentality, were erroneously and illegally included in the

tax base or formula for assessment of the deposits (or capital), reserves and undivided profits of the appellant and thereby in legal effect the state of Ohio imposed an illegal tax upon such securities exempted by the provisions of U. S. Code Title 31, Section 742 and Title 12, Section 1433.

5. The statutes of Ohio as construed and enforced by the order of the Tax Commissioner and the order of the Tax Commissioner unjustly and illegally discriminate against the appellant, deprive it of property without due process of law and deny it the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States.

Wherefore appellant prays that the finding and order of the appellee be reversed, vacated, set aside, and held for naught; that the appellant's claim for refund for the years [fol. 178] 1947-1952 and each of them be allowed; that the appellee be required to find the overpayments claimed and direct the refund and/or abatement thereof as prayed for by appellant; and for all such other relief to which appellant may be entitled.

First Federal Savings and Loan Association of Warren, by Geo. H. Watson, President, Robert G. Day, Attorney.

EXHIBIT A

[Omitted here in printing. Printed, supra.]

BEFORE THE BOARD OF TAX APPEALS

STIPULATION OF FACTS—Filed November 19, 1952

It is hereby stipulated and agreed by and between the parties hereto that the facts hereinafter stated are and shall be taken as true for all purposes in the above captioned case without further proof thereof, reserving to either party however the right to object to any part thereof upon the ground of relevancy or materiality and further reserving

to each party the right and privilege to offer additional evidence on any matter.

1. First Federal Savings and Loan Assoc-ation of Warren, Ohio (hereinafter called the "taxpayer") is and at all times hereinafter mentioned was a Federal Savings and Loan Association incorporated and existing under the laws of the United States, to wit, the Home Owners' Loan Act of 1933 as amended (Title 12 U. S. C., Section 1464, et seq.) and having its principal place of business in Warren, Ohio, and [fol. 179] as such is and was an incorporated financial institution located in this state under the provisions of the tax laws of Ohio. It was originally incorporated in 1922 as "The Warren Savings and Loan Association" under the Building and Loan Laws of the state of Ohio and was converted to a Federal Savings and Loan Association in 1936.

2. The taxpayer has never had or issued any permanent or non-withdrawable shares or stock. All of the accounts of the shareholders or depositors in the taxpayer are and at all times involved herein, have been represented by savings share account pass books to which all deposits and dividends are credited and all withdrawals debited; all of such accounts were and are withdrawable shares or stock; i.e., the persons owning, holding in trust or having the beneficial interest in such accounts have been and are entitled to withdraw any part or all of the amounts credited to their savings share accounts and to make deposits therein.

3. The taxpayer is a member of the Federal Home Loan Bank of Cincinnati.

4. The following are true and correct extracts from the rules and regulations for the Federal Savings and Loan System promulgated by the Federal Home Loan Bank Board:

> "Section 141.2 Federal Association—The term 'Federal association' means a Federal savings and loan association chartered by the board as provided in section 5 of the Home Owners' Loan Act of 1933, as amended.
>
> Section 141.3 Capital—The term 'capital' means the aggregate of the payments on savings accounts in a

Federal association, plus earnings credited thereto, less lawful deductions therefrom.

[fol. 180] Section 141.4 Savings Account—The term 'savings account' means the monetary interest of the holder thereof in the capital of a Federal association and consists of the withdrawal value of such interest.

Section 141.6 Withdrawal value—The term 'withdrawal value' means the amount paid on a savings account in a Federal association, plus earnings credited thereto, less lawful deductions therefrom.

Section 141.7 General reserves—The term 'general reserves' means the aggregate amount of reserves of a Federal association established by such association for the sole purpose of meeting losses. Any amount in a reserve for bad debts which is exclusively for bad debt losses, shall be deemed to be a part of the General Reserves and to be a part of the reserve for losses provided in the Charters of Federal associations which have a Charter E or a Charter K.

Section 141.8 Surplus—The term 'surplus' means the undistributed earnings of a Federal association which are held as unallocated reserves for general corporate use.

Section 145.6-12 Reserve for uncollected interest—A 'Reserve for Uncollected Interest' shall be maintained equivalent to all interest in default more than 90 days.

Section 145.17 Powers and duties—When designated for that purpose by the Secretary of the Treasury a Federal association shall perform all such reasonable duties as fiscal agent of the Government specified by the Secretary of the Treasury. Such a Federal association shall exercise only such powers and privileges as a fiscal agent of the Government as are enumerated in regulations prescribed by the Secretary of the Treasury. When the designation for that purpose by any other instrumentality of the United States has been [fol. 181] approved by the Board, a Federal association, upon qualification for such employment, shall perform the duties as agent of such instrumentality of the United States. Such a Federal association shall exercise only such powers and privileges as an agent

of any other instrumentality of the United States as are prescribed by such other instrumentality of the United States."

The following are true and correct extracts from the rules and regulations duly promulgated for the insurance of accounts under the National Housing Act as amended (Title 12 U. S. C., Section 1724 et seq.):

Section 163.11 Setting up, designation, and purpose of Federal Insurance reserve—Each insured institution shall set up a Federal insurance reserve account which shall be used solely for the purpose of absorbing losses. No insured institution may pay dividends from its Federal insurance reserve account. Any insured state-chartered institution may by resolution of its board of directors or by other appropriate corporate action designate as its Federal insurance reserve account any reserve account which under the provisions of state law is established for the sole purpose of absorbing losses. Evidence of such action shall be filed with the Corporation. With the prior written approval of the Corporation, any other reserve account which by specific and adequate corporate action of an insured institution is made subject to charges for losses only, may be designated as its Federal insurance reserve account. The general reserves of Federal savings and loan associations operating under Charter K or Charter N are deemed to meet the requirements of this section. Any amount in a reserve for bad debts, which is ex- [fol. 182] clusively for bad debt losses, shall be deemed to be a part of the Federal Insurance Reserve.

Section 163.12 Original credit to Federal Insurance reserve account—During the fiscal year in which a certificate of insurance is issued to an insured institution, it shall credit to its Federal insurance reserve account an amount at least equal to that fraction of three-tenths of one percent of all insurable accounts on the date of its latest financial statement or report in support of its application for insurance which the unexpired portion of its fiscal year from the date of such

certificate is to its full fiscal year, calculated to the nearest month.

Section 163.13 Regular credits—Each insured institution shall thereafter credit to its Federal insurance reserve, during each of its fiscal years, an amount equal to at least three-tenths of 1 percent of all insured accounts outstanding at the beginning of such fiscal year; and shall build up the Federal insurance reserve to an amount equal to at least 5 percent of all insured accounts within twenty years from such date: Provided, That credits to the Federal insurance reserve need not be made whenever such insurance reserve account equals or exceeds the minimum amounts required by this section. If for any reason, the Federal insurance reserve account of any institution which has been insured for at least twenty years is thereafter reduced to less than 5 percent of all insured accounts, such institution shall transfer to its Federal insurance reserve acount, for each dividend period at least 25 percent of its net operating income before the declaration of dividends or the payment of interest on savings, until its Federal insurance reserve account is again equal to at least 5 percent of all insured accounts.

[fol. 183] Section 163.14 Charging of losses and payment of dividends—No insured institution which has charged losses to its Federal insurance reserve account shall declare any dividends or pay any interest on savings unless the amount standing to the credit of such account, after deduction of all charges, is equal to at least the amounts required under Section 163.13: Provided, That, for any year dividends may be declared or interest on savings paid when losses are charged to such reserve, if the declaration of such dividends or the payment of such interest on savings is first approved by the Corporation: And provided further, That the Corporation hereby approves, for any such insured institution which has been insured for a period of twenty years or more and whose Federal insurance reserve account, prior to the charging of such losses, equalled at least 5 percent of all insured accounts, the declaration of dividends and the payment of interest on savings if such insured institution shall have first

transferred not less than 25 percent of its net operating income for the same dividend period to its Federal insurance reserve account."

5. The dates set by the Board of Tax Appeals under the provisions of General Code Section 5411-1 as of which the taxable deposits in financial institutions should be listed and assessed for the years involved herein are as follows:

Tax Year	
1947	November 7, 1946
1948	November 12, 1947
1949	November 4, 1948
1950	November 22, 1949
1951	November 14, 1950

[fol. 184] 6. The tax returns filed by the taxpayer and included in the transcript for the years involved herein are true and correct statements as to the items taken from the taxpayer's books of account. However, the taxpayer does not concede but contests the matters in issue herein including the conclusions in such returns relating to the amounts of taxable deposits, to the taxable value of shares or capital employed by the taxpayer, and the amount of taxes thereon.

7. The Tax Commissioner has assessed for the years and on or about the dates hereinafter set forth the taxpayer has paid the amount of financial institution taxes, set forth below to wit:

Tax Year	Date of Payment	Amount
1947	July 7, 1947	$11,488.37
1948	July 7, 1948	13,562.70
1949	July 6, 1949	15,842.98
1950	July 6, 1950	17,182.64
1951	July 10, 1951	19,376.70

8. Upon the dates hereinafter set forth, the amount of bonds of the United States with accrued interest thereon held by the taxpayer and included in its balance sheet and

the amount of Federal Home Loan Bank stock held by the taxpayer and included in its balance sheet were as follows:

Date	U. S. Bonds and Interest	Federal Home Loan Bank Stock
November 7, 1946	$2,127,818.70	$58,400.00
December 31, 1946	1,929,485.42	58,400.00
November 12, 1947	1,928,157.08	58,400.00
December 31, 1947	1,929,985.92	58,400.00
November 4, 1948	1,929,654.86	60,000.00
December 31, 1948	1,931,489.64	60,000.00
November 22, 1949	1,929,757.54	70,000.00
December 31, 1949	1,932,096.72	70,000.00
November 14, 1950	2,030,263.38	70,000.00
December 31, 1950	2,032,013.07	70,000.00

[fol. 185] 9. All of the returns referred to herein, the claims for refund and abatement, and notice of appeal were duly and regularly filed and the taxes were paid within the times required by law.

10. Upon the conversion of the Warren Savings and Loan Association into a federal savings and loan association in 1936, the total number of depositors or shareholders was 1677.

The number of savings share accounts of the taxpayer at the beginning, the number of new accounts opened and the number of accounts closed, in each of the years involved herein were and are as follows:

Year	Number at Beginning	New Accounts	Accounts Closed
1947	4958	1772	1038
1948	5692	2094	1159
1949	6627	1732	1287
1950	7072	3487	2756
1951	8479	3475	2799

First Federal Savings and Loan Association of Warren, Appellant, By Robert G. Day, Its Attorney. John W. Peck, Tax Commissioner, Appellee, By C. William O'Neill, Attorney General, Joseph S. Gill, First Assistant Attorney General.

[fol. 186] BEFORE THE BOARD OF TAX APPEALS

TRANSCRIPT OF PROCEEDINGS

Examiner Ford: Before the Board of Tax Appeals, Department of Taxation of Ohio. First Federal Savings and Loan Association of Warren, Warren, Ohio, appellant, against John W. Peck, Tax Commissioner of Ohio, appellee. Case Number 22533. Appeal filed herein under date of August 27, 1952, from a final order of the Tax Commissioner under date of July 30, 1952, denying application or applications for a certificate or certificates of abatement theretofore filed by the appellant for and on account of alleged overpayment of intangible taxes assessed against the appellant as a financial institution for the years 1947 to 1951, inclusive, which alleged overpayments arose, it is stated, by the inclusion in the taxable resources and in the tax basis of bonds and securities owned by the United States government and owned by the appellant, and stock in federal instrumentalities owned by the appellant with respect to such tax years.

Case heard before William J. Ford, attorney examiner for the Board of Tax Appeals, at Columbus, Ohio, at the hearing room of the board, on November 19, 1952, pursuant to assignment.

Counsel for the appellant and counsel for the appellee will enter their appearances by name and office address.

Mr. Day: Robert G. Day, Second National Building, Warren, Ohio, attorney for the appellant.

Mr. Gill: C. William O'Neill, by Joseph S. Gill, for the Tax Commissioner.

Examiner Ford: The board desires a statement of the case with respect to the issues involved therein. Mr. Day, will you proceed?

[fol. 187] Mr. Day: First, may we have a stipulation that the year 1952 is not in issue? I am asking that for the reason that the claim for refund or abatement which was filed before the payment of the 1952 tax and although it made a claim for abatement of that tax, that was ignored by the Tax Commissioner, I assume, by reason of the fact that it was prematurely filed.

Mr. Gill: I will so stipulate, Mr. Day, and there will be no attempt to bind the year 1952 in this proceeding.

Examiner Ford: Well, at any rate, without the stipulation, the only thing before the board is the matters of certificates for abatement on any alleged overpayment for the years 1947 to 1951, inclusive. That is all that is before the board.

Mr. Day: Briefly, the situation involved herein is as follows: The First Federal Savings and Loan Association is a federal savings and loan association, organized and existing under the Federal Home Loan Act of 1933 as amended. It was converted from a former state association, state building and loan association organized under the laws of Ohio in 1922. The method of operation of the taxpayer is approximately or substantially as follows: It receives sums on deposit which under its charter are called shares. They are credited in the deposit column and in the balance column of the pass books which are issued to each depositor. Twice a year each account, at least each account over $5 is credited with a dividend, so-called, just as interest is paid upon deposits in banks and that is added to the balance. Normally at any time, any part or all of the balance to the credit of any account may be withdrawn by the depositor or shareholder, so-called.

[fol. 188] The taxpayer has no accounts which are not withdrawable. That is, it has no shares which are not withdrawable and it has no other accounts except that at the outset, or I think in each of the years involved, there were some due borrowers' accounts which were simply the credit to borrowers when a loan is granted and until it has been entirely paid out. The borrower is credited with the amount of the loan granted less the amounts which are paid out.

This association, the taxpayer, has filed its—under the rules and regulations applicable to it, it sets up a federal insurance reserve which is a reserve for losses which are required under the federal savings and loan insurance which is provided for under the Federal Housing Act, I believe. All federal savings and loan associations are required to have their accounts insured. Then there is a contingency reserve which is likewise set up under the law, under the Federal Home Loan Act, and regulations thereunder in a certain percentage each half year.

The depositors are entitled to withdraw, as I said, any part or all of the amounts to their credit at any time, but

no one has any right to withdraw any part of all of the reserves or the undivided profits.

Now, on the dates required by law, the taxpayer filed its returns and they were duly filed and in those returns, on the forms provided by the Tax Commissioner, the amounts set forth were taken from the books of the association. Recently, following a decision of the Supreme Court of Ohio in the case of Wren Paper Company against Glander, it appeared that the court had held that it was improper to include in the tax base in that situation, which, by the way, was very similar to the tax base in the case at bar—very improper to include any federally owed securities. Con- [fol. 189] sequently, in behalf of this association, the taxpayer in the case at bar, we filed claims for refund based upon the reduction of the tax base in each year by the amount of federal bonds, United States bonds, and interest thereon accrued, owned by the taxpayer plus the Federal Home Loan Bank stock which it owned at that time.

These claims for refund or abatement were denied by the taxpayer——

Examiner Ford: You mean the Tax Commissioner.

Mr. Day: Tax Commissioner, pardon me, and an appeal was taken by the taxpayer.

In the stipulation which has been agreed upon covering most of the facts, we will show the turnover in the number of these accounts from year to year during the years involved herein. I think that will give you a general idea of the facts in the case at bar.

Examiner Ford: Let me ask you, Mr. Day, did this appellant before the Tax Commissioner make the claim and does it now make the claim before the board that it is entitled to certificates of abatement based upon the amount of the alleged overpayments during the years 1947 to 1951, inclusive, against the whole amount of the tax assessed against the appellant as a financial institution for said tax years, or does it claim a certificate of abatement only against the tax that was assessed not on the deposits, but on the capital employed by the company during said tax years?

Mr. Day: The claim, Your Honor, was against both items of the tax assessed, the deposits and the surplus or reserves and undivided profits. I assume that there may be two separate questions as to those two divisions of the tax.

Examiner Ford: Do you have any statement to make, Mr. Gill?

[fol. 190] Mr. Gill: It is the contention of the Tax Commissioner, Mr. Ford, that two things: One, that the Wren Paper case is not a precedent for this case and does not determine the issues here involved.

Two, that from the facts as set out in the stipulation and from Mr. Day's opening statement, this is a truly mutual concern, that it has no capital involved as such, that the only things involved are depositors' interest. The only thing that was taxed was depositors' interest in this institution. Therefore, there is not involved any constitutional question of taxation of capital because there is no capital in the institution.

Examiner Ford: You may proceed with your evidence.

Mr. Day: We have a stipulation of facts agreed to in behalf of both parties which I should like to file. Is it your practice to have these read into the record?

Examiner Ford: Read in the record. Both, that is, they will both be filed and read into the record.

Mr. Gill: There are some rules in there, Mr. Ford, that are pretty verbose. Could we agree to have the reporter copy that in the record? I don't think either Mr. Day or I particularly want to read those rules in.

Examiner Ford: Off the record.

(Discussion off the record.)

Examiner Ford: The stipulation of fact, signed by counsel for the parties herein is received and filed as of this day and the same, by agreement of counsel, is read into the record of this case as follows:

[Stipulation of facts omitted here in printing. See pp. 7-14, supra.]

Mr. Day: With Mr. Gill's consent, I should like to read in the record one paragraph of the regulations governing [fol. 191] agencies for the issuance of defense savings bonds, issued by the Treasury Department, April 15, 1941, the second paragraph only.

Mr. Gill: That is all right, Mr. Day. I object to its relevancy. I have no objection to the fact that he is reading from a printed copy, Mr. Ford.

Examiner Ford: You had better have it marked as an exhibit and have it passed on.

Mr. Day: We will mark this as an exhibit.

(Appellant's Exhibit 1 was marked for identification.)

Examiner Ford: Who is going to identify this? Is your witness going to identify it or will you identify it professionally?

Mr. Gill: Let the record show that I waive objection to the identification of the Appellant's Exhibit 1, but I object to its admission on the ground of its relevancy to the issue involved. I believe it is tendered for the purpose of showing that the appellant organization was a federal instrumentality during the period involved in a manner not relevant to the tax issue here before the board.

Examiner Ford: Let me take a look at that.

What do you claim for the second paragraph of Appellant's Exhibit 1 as evidence in this case?

Mr. Day: That is a designation of the taxpayer as a fiscal agent and then I have two succeeding instruments that follow that—that follow along with that, a specific trust agreement and a certification of qualification under that designation.

In other words, that is a general designation and these next two exhibits which I am about to offer will make it specific as to this taxpayer; showing qualifications as an [fol. 192] instrument of the government under that general designation.

Examiner Ford: Speaking for myself as examiner in this case, I don't see the materiality but members of the board may have a different notion about it. I feel that under the circumstances, in order that the board itself may have the picture before it that I will receive this particular evidence subject to the objection of counsel for the appellee and subject to the reservation hereby made that the competency, materiality and relevancy of this paragraph 2 of Appellant's Exhibit 1 be reserved for the consideration of the board upon the objection made by counsel for the appellee.

(Appellant's Exhibit No. 1 was received in evidence.)

Examiner Ford: It is so ordered, and the exception of counsel for the appellee is noted.

I understand you are not making any objection with respect to the identification of Appellant's Exhibit 1.

Mr. Gill: That is correct. It may be admitted as if it were properly identified.

Mr. Reporter, will you please note a request to the board that they rule on this piece of evidence in their entry in this case?

Examiner Ford: In so far as he is permitted to do so, the examiner orders and directs that this motion be hereby sustained.

Mr. Day: Please mark these in order.

(Appellant's Exhibits Nos. 2 and 3 were marked for identification.)

Mr. Day: We offer in evidence and ask leave to substitute copies of Appellant's Exhibit 2 which is an application and trust agreement on Treasury Department Form 3805 [fol. 193] following up the general designation in Appellant's Exhibit 1.

Likewise, Appellant's Exhibit No. 3 which is a certification by the Federal Reserve Bank of Cleveland, as fiscal agent of the United States, qualifications of First Federal Savings and Loan Association of Warren as an issuing agent for sale of United States defense bonds on Form No. 385-A, and we ask leave to substitute copies of each of them for the original in the record.

Mr. Gill: Your Honor, the appellee waives any objection as to identification or substitution of copies of these two proffered documents, but objects to them on the same grounds to which he objected to Exhibit No. 1.

Examiner Ford: The examiner has the same views with respect to Appellant's Exhibits 2 and 3 as he has with respect to paragraph 2 of Appellant's Exhibit 1. However, the ruling of the examiner will be the same as far as this hearing is concerned. The objection of counsel for the appellee to introduction of Appellant's Exhibits 2 and is overruled and said exhibits are received subject to the objection of counsel for the appellee to the exhibits on the ground as stated by him, that the same are not material or relevant to the issues in this case and the question of

materiality and relevancy so made [illegible] the objection of counsel for the appellee will be and hereby is reserved for the consideration of the board and the determination of the case on its merits.

(Appellant's Exhibits Nos. 2 and 3 were received.)

Examiner Ford: Note the exception of counsel for the appellee.

Mr. Gill: Motion that the board make a ruling on the admissibility of these offered exhibits in its entry in this case. [fol. 194] Examiner Ford: So far as the examiner is authorized to do so, the examiner sustains this motion.

Mr. Day: Please mark this.

(Appellant's Exhibit No. 4 was marked for identification.)

Mr. Day: I would like to offer in evidence the Appellant's Exhibit No. 4 which is a photostatic copy of the charter and amendments and the rules and regulations of the taxpayer certified by J. W. Whitaker, supervisory agent of the Home Loan Bank board.

Examiner Ford: As I understand it, Mr. Gill, speaking with respect to Appellant's Exhibits 2 and 3, you are making no question as to the identification of these documents?

Mr. Gill: No, sir, or the substitution of copies.

May I take a look at this? I think this may go in without objection.

This last offered exhibit may go in without objection, Mr. Ford.

Mr. Day: Please mark these in order.

(Appellant's Exhibits Nos. 5 through 9 were marked.)

Mr. Day: I now offer in evidence Appellant's Exhibits 5, 6, 7, 8, and 9.

I offer No. 4 in evidence.

Examiner Ford: It has not been ruled on yet.

Mr. Day: I beg your pardon.

Examiner Ford: Appellant's Exhibit 4, having been offered in evidence by counsel for the appellant—do you have any objection to the introduction of this exhibit, Mr. Gill?

Mr. Gill: I have no objection, Mr. Ford.

Examiner Ford: Appellant's Exhibit No. 4, offered in evidence, and without objection, the same is received.

[fol. 195] (Appellant's Exhibit No. 4 was received.)

Mr. Day: We now offer in evidence Appellant's Exhibits Nos. 5, 6, 7, 8, and 9, the tax bills covering the tax in question herein as rendered by the office of the treasurer of the state for the years 1947 through 1951, inclusive, and request leave to substitute copies.

(Discussion off the record.)

Examiner Ford: Do you have any objection?

Mr. Gill: No, just that it is a duplication. If you want to receive them, it is all right with me.

Examiner Ford: Appellant's Exhibits 5 to 9, inclusive, having been offered in evidence and counsel for appellee having stated that he has no objection to the introduction of said exhibits, the same are received and made a part of the record in this case.

(Appellant's Exhibits 5 through 9 were received.)

Mr. Day: I would like to have Mr. William C. Burkhart, assistant treasurer of the taxpayer, sworn for a very few questions.

William C. Burkhart, being first duly sworn, testified as follows:

Direct examination.

By Mr. Day:

Q. Face the attorney examiner when you answer. Will you state your name and address?

A. William C. Burkhart, 696 Meadowbrook, Southeast, Warren, Ohio.

Q. That is B-u-r-k-h-a-r-t, is it?

A. Yes.

Q. What is your occupation?

A. Assistant treasurer of the First Federal Savings and Loan Association of Warren, Ohio.

Q. How long have you been employed by the appellant in this case?

A. Since May 8, 1946.

[fol. 196] Q. And in what capacity have you been so employed?

A. Main capacity chief accountant in charge of their records.

Q. Will you state whether or not the association, the taxpayer, is still acting as fiscal agency for the government under these designations which have been introduced as Appellant's Exhibits 1, 2, and 3?

Mr. Gill: Objection.

Examiner Ford: In line with my former ruling as to Exhibits 1, and 2, and 3, the objection of counsel for appellee is overruled so far as this hearing is concerned and the objection of counsel for the appellee is reserved for the ruling of the board as to its materiality and relevancy on the determination of the merits of the case.

Mr. Gill: Yes, I will ask that the question be ruled upon. There is an objection to the form of that question, Mr. Ford. Why doesn't he just ask if they still sell war bonds under a designation?

Mr. Day: If there is an objection to the form of the question——

Examiner Ford: Wait a minute. You mean it embodies a conclusion?

Mr. Gill: It certainly does. He asked if they are still operating as a fiscal agency of the federal government.

Examiner Ford: Well, it might be objectionable on that ground alone, of course. If you insist on it, the objection will be sustained in that form. You may present another question.

By Mr. Day:

Q. What is the fact as to whether or not the taxpayer, the First Federal Savings and Loan Association of Warren is still selling war bonds, redeeming war bonds and acting [fol. 197] as consignee of war bonds under these designations, Appellant's Exhibits 1, 2, and 3?

Mr. Gill: I object to that on the ground of relevancy, Mr. Ford.

Examiner Ford: The objection of counsel for the appellee is overruled so far as this present hearing is concerned and the question presented by the objection of counsel for the appellee is reserved for the determination of the board upon the consideration of the merits of the case.

Mr. Gill: Motion for a ruling.

Examiner Ford: In so far as it is proper for the examiner to do so, it is hereby ordered and directed that the board make a specific ruling on this question presented by the objection of counsel for the appellee.

By Mr. Day:

Q. What is the fact as to whether the book and accounts of the taxpayer are audited periodically or not?

Examiner Ford: Let's see, what is the answer to the last question?

The Reporter: It was not answered.

Mr. Day: Withdraw the last question.

The Witness: In reply to the question, they are still selling defense savings bonds and cashing them as well.

By Mr. Day:

Q. And does the taxpayer still act as consignee holding bonds for sale?

A. Yes.

Examiner Ford: What do you mean by that?

The Witness: The Federal Reserve Bank of Cleveland sends us bonds on consignment which we hold and sell, making a monthly report and return to them for the bonds sold during that period.

[fol. 198] By Mr. Day:

Q. Now, the question following: What is the fact as to whether or not the books and accounts of the taxpayer are periodically audited by some outside agency?

A. Our books and accounts are examined and audited by the Home Loan Bank board federal examiners periodically, usually once a year, sometimes they run over maybe 18 to 22 months before they return for an examination.

Q. But when they do, do they take up at the point of the

termination of the last examination, or is there some break in the period there?

A. They take up from the date of the last examination.

Q. By whom were these tax returns of financial institutions prepared for First Federal Savings and Loan Association for the years 1947 through 1951, both inclusive?

A. I prepared those returns.

Mr. Day: You may cross examine.

Mr. Gill: I have no questions, sir.

(Witness excused.)

Mr. Day: I would like to make sure of this. Is the complete transcript from the Tax Commissioner considered a part of the evidence?

Examiner Ford: Those transcripts are a part of the record now. The law requires them to be filed by the Tax Commissioner with the Board of Tax Appeals. That law has been complied with and the transcripts are now a part of the record.

Mr. Day: We rest our case.

Mr. Gill: I have no evidence, Mr. Ford.

Examiner Ford: The appellant having rested, the appellee having rested, and there being no rebuttal evidence, the case is submitted.

[fols. 199-203] The case is submitted upon the appeal, submitted upon the transcript of the proceeding of the Tax Commissioner relating to the assessments made against the appellant as a financial institution for the years 1947 to 1951, inclusive; upon the transcript of the proceedings of the Tax Commissioner; upon the application for certificate or certificates of abatement; on the evidence adduced at the hearing of this case this day and upon briefs to be filed by counsel within such times as the rules of the board provide.

(Case submitted at 2 o'clock p. m.)

[Printing of all exhibits dispensed with by order of court.]

[fols. 204-213] BEFORE THE BOARD OF TAX APPEALS

APPELLANT'S EXHIBIT 4

Charter

Exhibit K

Pursuant to the provisions of Section 5 of the Home Owners' Loan Act of 1933, the Federal Home Loan Bank Board hereby issues the following charter:

1. Name. —The name of the Federal savings and loan association hereby chartered (hereinafter referred to as the "association") is "First Federal Savings and Loan Association of Warren".

• • •

All share accounts shall be nonassessable, and no holder thereof shall be responsible for any losses incurred by the association beyond the loss of the participation value of his share accounts at the time the loss is determined.

[fol. 214] [Stamp:] Paid July 7, 1947. Don H. Ebright, Treasurer, of State, Columbus, Ohio.

BEFORE THE BOARD OF TAX APPEALS

APPELLANT'S EXHIBIT 5

State of Ohio, Office of the Treasurer of State, Columbus, Ohio

No. 868

1947 Tax Bill for Personal Property of Financial Institutions

This bill is rendered in accordance with the provisions contained in Amended S. B. 30, and conforms with the Assessment Certificate previously rendered by The Department of Taxation.

Name: First Federal Savings & Loan Assn. of Warren.
175 E. Market St., Waren, Ohio.
Tax $11,488.36.

Notice

To avoid Penality, Please Remit on or Before July 20, 1947.

If Receipt is desired, enclose stamped self-addresed envelope and return this Statement and Stub with Remittance.

For Detail Please refer to assessment certificate.

Form No. 108, Don H. Ebright, Treasurer of State.

[fol. 215] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 216-217] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 220

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON—Filed July 24, 1954

Appellant adopts for its statement of points upon which it intends to rely in its appeal to this court, the points contained in its Assignment of Errors heretofore filed to the same extent as though fully repeated herein.

Copy of this Statement has been mailed to counsel for appellee this 22nd day of July, 1954.

Robert G. Day, Attorney for Appellant, Hoppe, Day & Ford, Second National Building, Warren, Ohio. Of counsel.

[fol. 218] [File endorsement omitted.]

[fol. 219] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 220

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WARREN, Appellant,

vs.

STANLEY J. BOWERS (Successor to John W. Peck), Tax Commissioner of Ohio

Appeal from the Supreme Court of the State of Ohio

ORDER NOTING PROBABLE JURISDICTION—October 14, 1954

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar. The Solicitor General is invited to file a brief as *amicus curiae*.

Mr. Justice Burton took no part in the consideration or decision of this question.